UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 99-1666

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HOSPITAL SAN PABLO, INC.,

Respondent.

_____

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board had jurisdiction over this proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. 160(a)), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction and venue under Section 10(e) of the Act (29 U.S.C. 160(e)) because the unfair labor practices occurred in Bayamon, Puerto Rico, within this judicial circuit, where Hospital San Pablo, Inc. (the "Employer") administers and operates a hospital. The Board's Decision and Order issued on December 15,

1998, and is reported at 327 NLRB No. 59 (AD. 1-12).[1] The Board's order is a final order that disposes of all claims with respect to all parties. The Board's application for enforcement was filed on June 3, 1999. This filing was timely inasmuch as the Act places no time limitations on the filings of such applications.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(1) of the Act by threatening to subcontract its employees' work and reduce their benefits if the employees voted for the Union; and by giving its employees the impression that their Union activities are under surveillance.

2. Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(3) and (1) of the Act by discharging employee Adibal Arroyo because of his Union activities.

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[1] "AD." refers to the paginated addendum attached to the Employer's brief which contains the Board's Decision and Order and the administrative law judge's Decision. "A(I)." refers to the first volume of the appendix to the parties' briefs which contains the transcript of the hearing conducted in this case on September 2-4 and November 19, 1997. "A(II)." refers to the second volume of the appendix which contains the exhibits introduced at that hearing. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case initially came before the Board on a charge filed by Federacion de Trabajadores de la Empresa Privada (FETEMP) (the "Union") alleging that the Employer had violated the Act by discharging employee Adibal Arroyo because of his activities on behalf of the Union and by engaging in certain other illegal actions. The Board's Puerto Rico Regional Office issued a complaint and the matter was litigated before a Board administrative law judge. The judge found that the Employer violated the Act as alleged and recommended entry by the Board of an appropriate remedial order. The Employer filed exceptions with the Board to the judge's Decision. After considering the exceptions and the record, the Board (Members Fox and Liebman, with Member Hurtgen dissenting) issued its Decision and Order adopting the judge's findings of violation and his recommended order.

The factual findings on which the Board based its conclusions and order are set forth in detail below.

I. THE BOARD'S FINDINGS OF FACT

A. Introduction; Employee Arroyo Solicits on Behalf of the Union at Work and away from Work; the Union Files Three Election Petitions

Adibal Arroyo began working for the Employer in November 1991 as a "technician for environmental services," the

Employer's housekeeping department. In October 1996 Arroyo and other employees became interested in unionizing. Arroyo obtained a telephone number from a co-worker and called Victor Villalba, the President of the Union. In the middle of October Arroyo and another employee, Roberto Cruz, met with Villalba at the Union's offices. About a week later, Arroyo, Cruz and several other employees from the housekeeping department met with Villalba at the Union's offices and signed Union authorization cards. The employees "chose . . . Arroyo as the custodian of the cards and . . . the person who would be collecting the signatures." Villalba then gave Arroyo additional cards and Arroyo in turn gave some of the cards to Cruz. (AD. 3; A(I). 29-33, 63-66.)

The next work day Arroyo and Cruz went to their "work areas" in the hospital and "distributed" the cards to other employees "in the bathrooms, and empty rooms and machine rooms, on the stairs." They also stood "at the entrance to the hospital when [they] were going in to work [and] would give [cards] out to some employees and whoever wanted to sign them would sign them," and, "at lunch time" in the "parking" area. Besides the solicitation at work, Arroyo telephoned some employees at home. In addition to handing out cards, Arroyo and Cruz held individual and group meetings with the employees to

explain the Union "process" to them. The meetings were held both at and away from the Hospital. The meetings at the Hospital were held "in the court next to the administration office and to the right side of the cafeteria." After a week, Arroyo collected the cards that had been signed--about 45--and delivered them to Vallalba at Villalba's office. (AD. 3; A(I). 66-67, 70-71, 215-217.)

On November 7, 1996, the Union filed a representation petition with the Board's Puerto Rico Regional Office, seeking a Board election for a unit limited to the Employer's housekeeping employees. The Employer "opposed" the unit. On November 20, 1966, the Union withdrew the petition. (AD. 3; A(I). 33-35, A(II). 72-74.)

Arroyo went on vacation on November 15, 1966, and remained away from work until January 9, 1997. On November 23, 1996, Arroyo married a co-worker. (AD. 3; A(I). 67-68, 98-99.)

Sometime in November 1996 the Employer's Administrator, Jorge de Jesus, held a meeting of the hospital's management personnel including its supervisors. At the meeting those in attendance "were told that there was a petition from the Union to come into the Hospital." By the end of the month, "all of the supervisors knew that there was a Union campaign going on . . . ." (AD. 3; A(I). 394-398.)

Toward the end of November 1996 Villalba met with Arroyo, Cruz and another employee at a restaurant in Bayamon. Villalba "explained to them that they had to get or collect signatures for a larger unit." Villalba gave Arroyo 100 cards. Cruz distributed cards at work and Arroyo solicited employees living near his home. Arroyo then returned about 80 signed cards to Villalba. On December 17, 1996, the Union filed a second representation petition with the Regional Office, seeking a Board election for a unit of all "non-professional employees" of the Employer. However, many of the cards submitted in support of this petition had been obtained from persons outside the unit. Accordingly, on January 7, 1997, the Union withdrew its second petition. (AD. 3; A(I). 39-43, 100-101, A(II). 73-74.)

Around the beginning of January 1997 Villalba telephoned Arroyo and told him that he would have to obtain yet more signed cards from employees in the unit. Arroyo resumed work on Thursday, January 9, and in the next 2 or 3 days collected 20 or 25 additional cards. Arroyo gave the cards to Villalba, and on January 16, 1997, the Union filed a third representation petition with the Regional Office, seeking a Board election for a unit of "non-professional" employees of the Employer. Subsequently, a Board-conducted election was scheduled for February 28, 1997. (AD. 3; A(I). 43-50, 68-70, A(II. 76.)

B. The Employer Discharges Arroyo; the Employer Implies that its Employees' Union Activities are under Surveillance

During this time, Arroyo's regular daily work shift ran from 6 AM to 2 PM including a half an hour for lunch, taken from 10:30 to 11:00 in the morning. However, the Employer had a long-standing practice that if an employee, at the Employer's request, worked through his lunch time without a break, the employee would be allowed to leave work at 1 PM. On Saturday, January 11, two days after his return to work, Arroyo, with the permission of Supervisor Ruiz, worked through his lunch period and left work at 1 PM. (AD. 3; A(I). 73-76, 139, 170, 186, 218-220, 437, 466.)

Two days later, on Monday, January 13, Arroyo reported for work at 6 AM. During the morning, Supervisor Baez assigned Arroyo to finish the work he had begun the previous day in the basement area with his co-worker Jorge Hernandez. Arroyo asked Baez if they "were going to continue straight through" the lunch period. At around 10:30 in the morning Baez "told [them] to continue working straight through and to leave at one o'clock." Arroyo and Hernandez agreed. (AD. 3; (A(I). 73, 76, 103, 169-171, 185-186.)

At about 12:50 PM Hernandez asked Baez to come to the work area. Baez arrived, inspected the work and said that "it was

okay but that [they] could not leave at one o'clock. [They could] leave at one thirty." Arroyo said that Baez a few hours before had given them permission to leave at one. Baez said that the Employer's policy had changed. Arroyo said that he had an "appointment" at one and that he did not agree with Baez's order. After some discussion, Hernandez said, "let's leave it at that and we'll talk about it on Thursday with the department director." Baez said, "okay," and Hernandez and Arroyo left the area. (AD. 3-4; A(I). 77-79, 113-115, 171-172, 187, 193, 195, 213-214.)

Arroyo went to the parking lot and went home. Hernandez returned to the hospital to visit a friend. While there he saw Baez, Employer Controller Marzan and others. Baez asked Hernandez where Arroyo was and Hernandez said that he did not know. Hernandez left the hospital about 1:40 PM and went home. Hernandez did not perform any work after 1 PM. (AD. 4; A(I). 80, 172-174, 196.)

Tuesday and Wednesday were non-work days for Arroyo and Hernandez. On Thursday, January 16, Hernandez was asked to attend a meeting with Begona Melendez, the Employer's Director of Human Resources. Present also were Baez and Maria Eugenia Del Rio, the Employer's Director of the Environmental Services Department. Melendez read a report written by Baez about the

Monday incident, in which Baez stated that Arroyo left at 1:00 PM over Baez's objection but that Hernandez continued to work until 1:30 PM. Melendez and the others "told [Hernandez] that nothing was going to happen to [him] because . . . Arroyo had been insubordinate because he had left and [Hernandez] was the one who had stayed. To which [Hernandez] told them that [he] had also left. {He] had not stayed." They asked Hernandez for an account of what had happened and Hernandez "stood on the fifth amendment because Mr. Arroyo wasn't there . . . ." They also told Hernandez that they "had paid [him] that half hour that [he] stayed." (AD. 4; A(I). 174-177, 202, 295, 337, 431-432, A(II). 77-80.)

Shortly after meeting with Hernandez, Melendez, Baez and Del Rio met with Arroyo. Melendez read Baez's report about the Monday incident. Arroyo said that the report "was not true;" that Baez had "authorized" Arroyo and Hernandez to work through their lunch time and to leave at one o'clock; and that "both left at one o'clock and that Mr. Victor Baez, the supervisor, knew it." Arroyo suggested Melendez talk to Hernandez about the matter but she said that she had already spoken to Hernandez. Arroyo referred to his prior evaluations and said that "they had all been over ninety" but Melendez responded "that an employee could have a hundred in his evaluations but an act of

insubordination was zero." Melendez then "fired" Arroyo. (AD. 4-5; A(I). 80-84, 122-123, 300, 339-341, 434-436.)

About a week after Arroyo's termination, Hernandez heard "rumors" that he and another employee had signed cards for the Union. Hernandez met Director Del Rio at the hospital. Hernandez told Del Rio that he "had nothing to do with any of that stuff from the Union. That [he was] only in the middle, [he] maintain[s himself] in the middle." Del Rio told Hernandez "not to worry, that [he] was not on the list." Hernandez was never discharged. (AD. 5; A(I). 181-182, 386, 399-401, 406, 442.)

On February 10, 1997, Hernandez purchased a money order payable to the Employer for $2.81 and gave it to the payroll department. The next day, Melendez asked Hernandez why he had given the Employer the money order. Hernandez said that "it was for the half hour I did not stay working." Hernandez added that he "didn't care if [he] was terminated because they had contaminated the climate for [him] in the office." Melendez asked Hernandez if he "was being pressured . . . by the union people?" Hernandez said no, that the reason for his action was "because of [his] own pride, because [he] came to work and [has] personal pride and . . . can't say lies. And in this process

the one who lied was Victor Baez." (AD. 5; A(I). 177-180, 209-211, 382-385, 444-446, A(II). 66-69.)

On February 25, 1997, three days before the election scheduled for February 28, employee Cruz met with Director Del Rio about a warning given to him. During the meeting, Del Rio said that in prior union campaigns at the hospital the Employer "knew which employees were for or against the Union." Del Rio added that "the hospital had been very good to those employees because it had allowed them to continue working [although they] did not deserve to be working" there. Cruz said that if the Employer "knew who was in the Union, since Adibal Arroyo was no longer there [Cruz] would be the first one on the list." Del Rio stated that Cruz should "not take it that way because that's not where she was coming from." (AD 5-6; A(I). 224-225, 238-242, 388-390.)

C. The Employer Threatens its Employees; the Union Loses the Election

Prior to the February 28 election the Employer held three or four meetings with its employees in the hospital's auditorium. At these meetings the Employer's Administrator, Jorge de Jesus, said, among other things, that at one time the operation of the parking lot had been handled by a subcontractor but that the Employer had canceled the contract and had used its own employees to do the work. De Jesus continued that "if a

Union won [the election], they could bring another private Company to take over [the employees'] services." He also said that "if a Union won, they could fire all of [the employees] and bring in a Company for [their] services, the same as they could do with security or dietitian service." On another occasion, De Jesus described the benefits presently offered by the Employer to the employees. He added that "if a Union won, the benefits would start at zero." (AD. 5; A(I). 150-153, 160-162, 221-224, 237, 255.)

At the election held on February 28, the Union lost by a vote of 133 to 95, with 22 challenged but non-determinative ballots. The Union did not file objections to the election. (AD. 3; A(I). 45-46, 60-61, A(II). 75.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that the Employer violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by threatening to subcontract its employees' work and reduce their benefits if the employees voted for the Union; and by giving its employees the impression that their Union activities are under surveillance. The Board further found that the Employer violated Section 8(a)(3) and (1) of the Act (29 U.S.C. 158 (a)(3) and (1)) by discharging employee Arroyo because of his Union activities. (AD. 1, 8-11.)

The Board's order requires the Employer to cease and desist from the unfair labor practices found and from "in any like or related manner" infringing upon its employees' Section 7 rights. Affirmatively, the order directs the Employer to offer Arroyo reinstatement to his former job with backpay and to post an appropriate notice. (AD. 1, 11-12.)

SUMMARY OF ARGUMENT

An employer violates Section 8(a)(1) of the Act by threatening to subcontract its employees' work and reduce their benefits if the employees vote for the union in a Board-conducted election. An employer also violates the Act by giving its employees the impression that their union activities are under surveillance.

The credited evidence here shows that the Employer told its employees that if the Union won the election, it would "bring another private company in" to do the employees' work, and that "the benefits would start at zero." Shortly after the illegal discharge of leading Union activist Arroyo, the Employer told neutral employee Hernandez that he, unlike Arroyo, had nothing to fear because he "was not on the list." Such statements clearly violate the Act. The Employer's claim that the Board should have credited its witnesses who denied making the

statements lacks merit inasmuch as the Board's findings of fact are well within the bounds of reason.

An employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in union activities. In such a case the General Counsel has the initial burden of showing that the employer's action was motivated in whole or in part by the employee's union activities. Among other things, the General Counsel must show that the employee was engaged in union activities and that the employer was aware of the activity, that the employer was hostile to the activity, and that there was a causal link between the animus and the employer's action. If the General Counsel meets these requirements, the burden shifts to the employer to show, if it can, that it would have taken the same action against the employee even if the employee had not engaged in the union activity. If the employer does not meet this burden, the Board may find the employer's action illegal.

Motive is a question of fact and the Court's standard of review in such a case is a deferential one. The Court will not substitute its judgment for the Board's where the evidence presents a choice between two fairly conflicting views. Credibility findings based upon a witness's demeanor and testimony are entitled to great weight.

The evidence fully supports the Board's finding that the Employer's discharge of Arroyo was because of his Union activities and thus unlawful. Arroyo was the leading Union organizer. For two and a half months Arroyo distributed, and solicited signatures on, Union authorization cards openly at work and conducted Union meetings on the Employer's property. Arroyo's card solicitations continued right up to the day before the incident which lead to his termination.

On January 13, 1997, Arroyo and co-worker Hernandez asked their supervisor for permission to work through the lunch period and leave work early. The supervisor at first approved their request but then, when the employees thought they could leave, told them that they had to continue working to the end of the shift. Both employees protested the supervisor's action and both left without obeying his order to continue working. The supervisor reported the incident to management, falsely claiming the Arroyo left work early but that Hernandez did not. Management purported to investigate the matter by first asking Hernandez what had happened. Hernandez told them that, contrary to what the supervisor had claimed, both he and Arroyo left work together before the end of the shift. Nonetheless, the Employer then discharged Arroyo but took no action against Hernandez. Management later told Hernandez, a neutral employee, that,

unlike activist Arroyo, he had nothing to fear because he "was not on the list."

These facts -- Arroyo's Union activities, the Employer's anti-union animus, the timing of the discharge, the spurious nature of the Employer's investigation of the incident, and the disparity between the treatment accorded Arroyo and that accorded Hernandez -- make clear that the Employer's discharge of Arroyo was illegally motivated.

The Employer's claim that the evidence fails to show that the Employer had knowledge of Arroyo's Union activities lacks merit. This Court has repeatedly held that such knowledge need not be shown by direct evidence but may be inferred from the surrounding circumstances. This, where (1) the employee engages in observable union activities on the employer's property, (2) the employer is hostile to the activity, and (3) the reason given by the employer for its action is false, the Board is justified in inferring the requisite knowledge. All of these elements are present in this case and support the Board's finding of knowledge.

Finally, the Board properly found that the Employer failed to show that it would have terminated Arroyo even if he had not engaged in Union activities. Hernandez, a neutral, committed the same infraction that activist Arroyo did but was not

discharged. Hernandez, like Arroyo, also displayed a hostile attitude toward management; not only was Hernandez not disciplined but he was offered "assistance and support." In addition, other employees besides Hernandez engaged in work behavior as bad as or worse than that of Arroyo but never received anything more than a suspension. All of these facts belie the Employer's assertion that its treatment of Arroyo was even-handed.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO SUBCONTRACT ITS EMPLOYEES' WORK AND REDUCE THEIR BENEFITS IF THE EMPLOYEES VOTED FOR THE UNION; AND BY GIVING ITS EMPLOYEES THE IMPRESSION THAT THEIR UNION ACTIVITIES ARE UNDER SURVEILLANCE

It is well settled that an employer violates Section 8(a)(1) of the Act by threatening to subcontract its employees' work and reduce their benefits if the employees vote for the union in a Board-conducted election. See NLRB v. Hasbro Industries, Inc., 672 F.2d 978, 985-986 (1st Cir. 1982)(manager's statement that employer "would never let another union in here . . . They would farm the work out before they would" held illegal); Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 145-146 (1st Cir 1981)(employer's statement "that if the employees opted for unionization, . . . bargaining would 'begin

at zero' and work up" held unlawful); Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 40 (1st Cir. 1989)(employers' "'bargaining from scratch'" speeches held illegal when "accompanied by other serious unfair labor practices such as the discriminatory treatment of labor organizers"). It is also settled that an employer violates the Act by giving its employees the impression that their union activities are under surveillance. See NLRB v. Hasbro Industries, Inc., 672 F.2d at 986-987 (employer's statement suggesting that "the Company is keeping track of union activity and is ready to hold it against employees generally even if not against [the employee hearing the statement] at the precise moment" held "sufficiently coercive in character to support the Board's finding of violation").

In this case, the credited evidence (supra, pp. 10, 11-12) shows that the Employer prior to the election conducted meetings with its employees at which its administrator, its highest official, told the employees that "if a Union won, [the Employer] could bring another private company to take over [the employees'] services," and that "if a Union won, the benefits would start at zero." These statements are clearly illegal under the precedents cited above. Further, a week after Arroyo's discharge (which, as we show infra, was unlawful) employee Hernandez, in order to counteract certain rumors,

sought out Director Del Rio to tell her that he, unlike Arroyo, was not a Union activist. Del Rio advised Hernandez "not to worry [because he] was not on the list." Several weeks later, just before the election, Del Rio made a similar comment to employee Cruz, telling him that in previous union campaigns the Employer "knew which employees were for or against the Union." Del Rio's statements plainly imply that the Employer is watching for and maintaining records of its employees' Union activities, and that the employees who are pro-union have something to fear. Particularly in view of the fact that the statements followed closely on the unlawful discharge of Arroyo, there can be no doubt that the statements were coercive and thus illegal.

In its brief, pp. 40-44, 53-58, the Employer does not dispute that its statements, as found by the Board, are illegal. Instead, it contends that the Board should have credited not the General Counsel's witnesses but rather its witnesses who gave a different, assertedly lawful version of what had been said. However, as this Court stated in NLRB v. American Spring Bed Mfg. Co., 670 F.2d 1236, 1242 (1st Cir. 1982), the "credibility of witnesses is for the ALJ to determine, and the reviewing court will set aside such findings only when he oversteps the bounds of reason." Accord Holyoke Visiting Nurses Ass'n v. NLRB, 11 F.3d 302, 308 (1st Cir. 1993). In this case, the

administrative law judge devoted two full, single-spaced pages of his Decision to a careful discussion of just why he credited the testimony of certain witnesses over the contrary testimony of other witnesses, including the testimony of the employees who heard the statements in issue here (AD. 6-8.) There is nothing unreasonable, implausible or inherently unreliable about the findings the judge made. In these circumstances there is no basis for rejecting them.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE ADIBAL ARROYO BECAUSE OF HIS UNION ACTIVITIES

A. Introduction, Applicable Principles and Standard of Review

It is well settled that an employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in union or other protected activities. It is also settled that in such a case the initial burden is on the General Counsel to show that the employer's action was motivated, at least in part, by the employee's union or other protected activities. The General Counsel satisfies his or her burden by showing (1) that the employee was engaged in protected activity; (2) that the employer was aware of the activity; (3) that the employer harbored animus toward such activity; and (4) that there was a causal connection between the animus and the action

against the employee. Among the factors the Board may consider in resolving motive issues are timing, differences in the application of the disciplinary rules, procedures used for discharge, the investigation of the purported reasons for the discharge and the justification for the discharge. If the General Counsel meets these requirements, the burden shifts to the employer to show, if it can, that it would have taken the same action against the employee even if the employee had not engaged in the protected activity. If the employer fails to meet this burden, the Board may find the employer's action illegal. See NLRB v. Transportation Management Corp., 462 U.S. 393, 401-403 (1983); McGaw of Puerto Rico, Inc. v. NLRB, 135 F.3d 1, 8 (1st Cir. 1997); Yesterday's Children, Inc. v. NLRB, 115 F.3d 36, 48-49 (1st Cir. 1997); NLRB v. Crafts Precision Industries, Inc., 16 F.3d 24, 27 (1st Cir. 1994); Cumberland Farms, Inc. v. NLRB, 984 F.2d 556, 560 (1st Cir. 1993); NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 27 (1st Cir. 1985).

In its brief, p. 34, the Employer, citing NLRB v. Fibers International Corporation, 439 F.2d 1311, 1312 (1st Cir. 1971), contends that the rule in this Circuit is that "the Board has the burden of making a clear showing that the employer's dominant motive was not a proper business one, but union animus." This contention is erroneous. The "rule" relied on by

the Employer pre-dated the Supreme Court's decision in Transportation Management which approved the Board's rule that the General Counsel need only show that "a discharge or other adverse action . . . is based in whole or in part on antiunion animus--or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action." 462 U.S. at 401. This Court since Transportation Management has consistently applied the Board's rule. See the cases cited supra.

Motive is a question of fact and the Court's standard of review in such a case is a deferential one. The Board's findings of fact are binding on the Court if supported by substantial evidence on the record considered as a whole. In this regard, the Court may not substitute its judgment for that of the Board where the choice is between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it de novo. Finally, an administrative law judge's credibility findings are entitled to great weight inasmuch as he or she, not the Board or the Court, was the one who had the opportunity to hear and observe the witnesses' demeanor and testimony. See, for example, McGaw of Puerto Rico, Inc. v. NLRB, 135 F.3d at 7; Yesterday's Children, Inc. v. NLRB, 115 F.3d at 44.

In the instant case, the administrative law judge and the Board found that Arroyo's activity on behalf of the Union "was a motivating factor in the decision to discharge him" and that the Employer failed to show that "it would have discharged him even absent his union activity" (AD. 1). We show below that the record amply supports these findings.

B. Arroyo's Union Activity was a Motivating Cause of his Discharge

The evidence shows, and the Employer does not seriously question, that Arroyo was the leading Union activist in the organizational movement. In October 1996 Arroyo took the initial step in contacting the Union. Within a week Arroyo, fellow employee Cruz and several other employees met with Union President Villalba and signed Union authorization cards. Vaillalba gave Arroyo and Cruz additional cards and the next day they began to distribute the cards to the other employees at the hospital. Arroyo and Cruz made no attempt to conceal what they were doing. They handed out the cards "in the bathrooms and empty rooms and machine rooms, on the stairs . . . at the entrance to the hospital when [they] were going in to work" and "at lunch time" in the "parking" area. Arroyo also telephoned employees at their homes to solicit them. Besides distributing the cards Arroyo and Cruz conducted meetings with the employees to discuss the Union. Some of these meetings were held at the

hospital "in the court next to the [hospital's] administration office and to the right side of the cafeteria." By November 1996 the Employer was admittedly aware of the Union activity at the Hospital.

As a result of the labors of Arroyo and Cruz, the Union was able to file three representation petitions with the Board. The first petition, filed November 7, 1966, had to be withdrawn two weeks later because the unit was too small; the second, filed December 17, had to be withdrawn three weeks later because of an insufficient number of cards; and the third, filed January 16, 1997, eventually led to the election held February 28, 1997. During each of these three consecutive organizing campaigns, spanning a two and a half month period, Arroyo and Cruz responded every time to the Union's request for more cards by repeatedly approaching their fellow employees for aid. In the last campaign, Arroyo returned to work on Thursday, January 9, 1997, following a lengthy vacation, and by himself in the next two or three days collected an additional 20 or 25 cards from employees at the hospital.

This effort proved to be Arroyo's final at-work card solicitation. The following Monday, January 13, 1997, Arroyo and co-worker Hernandez asked their Supervisor Baez if they could work through their lunch period and leave work at one

o'clock rather than the normal two o'clock quitting time, a practice which the Employer had previously allowed. Baez said yes. However, at one o'clock, when Arroyo and Hernandez prepared to leave, Baez reneged on his promise and said that they had to remain until 1:30. After some discussion, Arroyo and Hernandez said they would both leave at one o'clock, as Baez had said they could, and resolve the dispute on Thursday, January 16, their next working day. Both Arroyo and Hernandez then left without performing any more work, although Hernandez remained on the premises for another 30-40 minutes to see a friend.

Baez reported the incident to upper management, falsely claiming that Arroyo had left at one o'clock but that Hernandez had continued to work until 1:30. Melendez, the Employer's Director of Human Resources, undertook to investigate the matter. Among other things, she interviewed Hernandez and asked him if Baez's version was correct. Hernandez told her that it was not, that in fact both he and Arroyo left together and did not perform any work after one o'clock. Nonetheless, Melendez "fired" Arroyo on the ground that he had disobeyed Baez's orders. Melendez never took any action against Hernandez, even though Hernandez later attempted to return to the Employer the wages assertedly paid him for the half hour he did not work.

Director Del Rio told Hernandez that the explanation for this discrepancy was that Hernandez, unlike Union activist Arroyo, "was not on the list." (supra, pp. 4-11)

These facts amply support the Board's finding that Arroyo's discharge was illegally motivated. Arroyo--a five-year veteran employee--was the principal Union adherent and card solicitor. His activities were carried out continuously over a two and a half month period right up to the day before the incident which resulted in his termination. As we have shown in the previous section, supra, pp. 17-20, the Employer was evidently hostile to its employees' organizing activities. The Employer's alleged justification for its action--that Arroyo refused to obey supervisor Baez's order--is patently untrue inasmuch as Baez had initially given him permission to leave. The Employer's purported investigation of the incident which led to Arroyo's discharge was a sham. The "investigation" revealed to the Employer that Hernandez left work at the same time that Arroyo did. Nonetheless, the Employer ignored the information which it had obtained from the investigation and penalized Arroyo alone even though Hernandez engaged in the identical behavior. The Employer later effectively admitted to Hernandez that the reason for its disparate action was because he "was not on the list." In these circumstances, there can be no real dispute that the

Employer's action was at least partly, if not entirely, motivated by Arroyo's Union activity.

The Employer suggests (Br. 30-31, 41) that its alleged lack of Union animus is shown by the fact that it did not discharge Cruz or other employees who were also active in the organizational effort. However, this fact, while relevant, is entitled to little weight. See NLRB v. Puerto Rico Telephone Company, 357 F.2d 919, 920 (1st Cir. 1966) ("fact that other union activists were retained by the company" held not controlling, the Court stating that "A violation of the Act does not need to be wholesale to be a violation"); Nachman Corporation v. NLRB, 337 F.2d 421, 424 (7th Cir. 1964) ("a discrminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents").

The Employer also contends (Br. 34-44) that the evidence does not show that it had direct knowledge of Arroyo's Union activities. However, this Court has held that "It is now well established that such knowledge need not be based on direct personal observation, but can be inferred from the facts and circumstances involved." NLRB v. South Shore Hospital, 571 F.2d 677, 683 (1st Cir. 1978). Accord NLRB v. Long Island Airport Limousine Serv. Corp., 468 F.2d 292, 295 (2nd Cir. 1972)("there

is no good reason why the two factual propositions--employer knowledge of general Union activity and employer anti-Union motivation in discharging a particular employee--need to be proved by different types of evidence. As to each, direct evidence may not be obtainable and circumstantial evidence and 'inferences of probability drawn from the totality of other facts,' . . . are perfectly proper"). Relevant factors in this regard are the employer's stated position vis-à-vis the union and whether the discriminatee's union activities are conducted at work or away from work. As this Court stated in NLRB v. Magnesium Casting Co., Inc., 668 F.2d 13, 16 (1st Cir. 1981):

> . . . at least as corroboration it is reasonable to suppose that an employer would know who the union activists are in an overt, strongly resisted union campaign. This is so particularly when they solicit at the plant, as [the discriminatee] did, during coffee breaks and before their work shifts almost every day.

And where these factors are present along with a showing that the employer's stated reason for the discharge is false, "[s]uch a chain of circumstances . . . strengthen[s] the inference that the employer's opportunity for observation of the union activity in fact bore fruit." NLRB v. Joseph Antell, Inc., 358 F.2d 880, 883 (1st Cir. 1966). As this Court summarized in NLRB v. American Spring Bed Mfg. Co., 670 F.2d 1236, 1245 (1st Cir. 1982):

> A possibility of observation may be sufficient provided there is "other, affirmative evidence indicating that the employer in fact knew." . . . Under these circumstances, direct knowledge is not necessary. Affirmative evidence for this purpose may also be the same evidence that allows the inference that the Company was motivated by anti-union animus: the soundness of the reasons with which the employer seeks to justify the discharge; the procedures used to discharge the employee; the timing of the discharge; and the simultaneous occurrence of other unfair labor practices.

All of these elements exist here. As we have shown, the Employer strongly resisted the Union's organizing campaign and simultaneously committed other unfair labor practices including illegal surveillance of the organizing efforts. Arroyo conducted his numerous card solicitations and Union meetings openly on public areas of the Employer's property. His activities, like those of all of the Union's supporters, could not possibly go unnoticed.[2] Arroyo's discharge occurred just a few days after his last in-plant card solicitation. The reason given for Arroyo's discharge was a false one, and the "investigation" of his alleged misdeed was counterfeit. In these circumstances, the Board was fully warranted in inferring that the Employer had knowledge of Arroyo's Union activities.

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[2] For example, Employer witness Del Rio testified that she was told by Hernandez that an Employer supervisor, on seeing Hernandez speak to a co-worker, "made some comment to the effect that, 'Oh, look, they are handing out some cards.'" (A(I). 386)

C. The Employer Failed to Show that It Would Have Discharged Arroyo Even in the Absence of his Union Activity

The judge and the Board properly found that the Employer did not prove that it would have terminated Arroyo for disobeying Baez's order to work even if he had not engaged in Union activity. First of all, as we have already shown, both Arroyo and Hernandez refused Baez's order to work but only Arroyo was discharged. The Employer took this action despite (1) Hernandez's disclosure to it during its "investigation" that he had left work at one o'clock along with Arroyo and (2) Hernandez's subsequent attempt to return the wages paid to him by the Employer for the time he supposedly worked. Although the Employer claims (Br. 48-49, 50-51, A(I). 309) that it was additionally motivated by Arroyo's hostile reaction to its investigation, Hernandez, according to the Employer's own memorandum, also "showed a very hostile attitude" at the meeting when he attempted to return the half-hour wages to the Employer, but nonetheless was never disciplined. Rather, Hernandez was offered "assistance and support . . . ." (A(I). 402-407, A(II). 66-67). No such solicitude was shown to Arroyo. In fact, Del Rio admitted that she never even "consider[ed] giving Mr. Arroyo an opportunity to consider the error he had made and take some vacation time and think it over instead of just discharging him"

(A(I). 407). The Employer's asserted justification for its action, therefore, is without merit.

The Employer again challenges (Br. 44-48) the judge's findings in this regard which were based on credibility resolutions (AD. 6-8). However, the judge's findings, as before, are in no way unreasonable or inconsistent with other evidence in the case. Rather, they are logical conclusions to draw, based on all of the evidence, both disputed and undisputed, including that of the Employer. For example, even the Employer's witnesses acknowledged that Hernandez during the "investigation" stated to them that he left work at one o'clock with Arroyo, although they claimed that he initially said otherwise (A(I). 295-296, 337, 431-432, 472). This acknowledgement tends to give credence to Hernandez's story. At the very least, it should have put the Employer on notice that Baez's version of events was highly questionable. The Employer, however, simply ignored these discrepancies and, without further debate, peremptorily discharged Arroyo a few minutes later. These facts portray a management determined to rid itself of Arroyo at any cost and wholly undermine the Employer's claim that it would have treated Arroyo in the same manner even if he had not been the leading Union activist.

Second, the record shows that other employees besides Hernandez engaged in work behavior as bad as or worse than Arroyo's alleged infraction but never received anything more than a suspension. For example, employee Rivera many times failed to report for work or call in, refused to carry out a work order, and then bragged about his actions to other employees. The Employer tolerated this conduct for over three years, giving Rivera only short suspensions before finally discharging him. Employee Villalobos ate in the pantry, left before completing his assigned tasks, left the premises without permission, and was found sleeping on the job. He only received suspensions. And Hernandez made an insulting remark about Baez which Baez viewed as "a great form of disrespect." Hernandez only received a warning. (AD 1, 6, 10; A(I). 264-276, 307-308, A(II). 20-65, 85-86.)

In sum, the Board and the judge correctly found that all of these facts belie the Employer's assertion that its treatment of Arroyo was even-handed. See for example, Yesterday's Children Inc. v. NLRB, 115 F.3d at 49 ("only [the discriminatee] was disciplined for the sunburn incident. While the employer was undoubtedly justified in disciplining her for her role in the incident, the employer has failed to explain why no one else was disciplined too. This disparate treatment is telling");

Cumberland Farms, Inc. v. NLRB, 984 F.2d at 560 (the two discriminatees "were the only employees that the Company ever disciplined for alleged violations of the no-solicitation rule. Accordingly, the Board reasonably determined that the no-solicitation rule was merely a pretextual justification for an illegal discharge").

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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September 1999

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	:	
	:	
	:	No. 99-1666
Petitioner,	:	
	:	Board Case No.
v.	:	24-CA-7611
	:	
HOSPITAL SAN PABLO, INC.,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two paper copies of the Board's brief and one copy of a computer readable disc of the brief in the above-captioned case were this day served by first class mail on the following counsel at the address listed below:

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Dated at Washington, D.C.
this 24th day of September 1999

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B)(i) and (C)(i) of the Federal Rules of Appellate Procedure, the undersigned counsel for the National Labor Relations Board certifies that this brief contains 7, 272 words.

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John D. Burgoyne